APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Opinion
66 AD 469

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs,

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendants.

Appearances:

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Attorneys for Plaintiffs

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Of Counsel

GAGLIARDI, *D. J.*

On May 9, 1965, the M.V. Maranon, a cargo vessel owned by the respondent Corporacion Peruana De Vapores

departed Chancay, Peru bound for Baltimore, Maryland. Included in the cargo of the Maranon were approximately 132,000 bags of anchovy fishmeal that had been shipped from various ports in Peru and were destined for Baltimore. When the Maranon was three days out of Chancay overheating developed in some of the sacks of fishmeal that had been loaded at Matarani, Peru and stowed in lower holds two, three and four. Upon the discovery of the overheating, the master of the Maranon ordered certain sacks of the fishmeal placed on deck and others thrown overboard in an attempt to isolate and alleviate the problem.

At the request of her master, the Maranon was boarded by surveyors after her arrival at the Panama Canal Zone on May 13, 1965. The surveyors examined the Maranon's cargo area, taking temperature at points where overheating had been reported. The master elected to proceed with the voyage. However, shortly after the Maranon departed Cristobal, Panama Canal Zone, additional overheating developed and fire broke out in the Matarani fishmeal. On May 18, 1965 the master diverted the Maranon to Savannah, Georgia where the voyage was terminated and General Average was declared.

On May 11, 1966, a libel and complaint was filed against the Maranon by the cargo owners, asserting cargo loss through the fault and privity of the vessel owners and seeking $203,000 in damages. (On May 17, 1966 an amended libel and complaint was filed increasing the prayer for relief to $212,000). On July 31, 1968, respondent filed an answer and counterclaim asserting defenses under various sections of the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq., [hereinafter referred to as COGSA] and under the so-called "Fire Statute," 46 U.S.C. § 182, and seeking $95,-

240.33 in General Average contributions due from Cargo. The action was tried before this court on June 20, 21 and 26, 1972.

Under section 1304(m) of COGSA, 46 U.S.C. § 1304(m), a vessel owner is afforded limited liability for any cargo damage or loss arising from the inherent defect, quality or vice of the goods. Additionally, the extent of a shipowner's liability for cargo damage in the case of fire is clearly delineated by the provisions of section 1304(2)(b) of COGSA, 46 U.S.C. § 1304(2)(b), and by the Fire Statute, 46 U.S.C. § 182. Under these statutes, a shipowner is not liable, beyond General Average, for cargo damage resulting from fire unless caused by the "actual fault or privity" or by the "design or neglect" of the owner. Thus, the shipowner is afforded limited liability for fire damage arising from fault attributable to the master or crew of the vessel as opposed to the personal fault of the owner or its managing officers. *E.g., Consumers Import Co.* v. *Kabushiki Naisha*, 320 U.S. 249 (1943); *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932); *Hershey Chocolate Corp.* v. *The S.S. Robert Lukenbach*, 184 F. Supp. 134 (D. Ore. 1960), *aff'd sub. nom., Albina Engine & Machine Works, Inc.* v. *Hershey Chocolate Corp.*, 259 F. 2d 619 (9th Cir., 1961).

The plaintiffs contend that the damage to the fishmeal cargo aboard the Maranon was not the result of an inherent vice but of improper stowage. In addition, the plaintiffs contend that an erroneous decision to proceed with the voyage beyond Panama resulted in further cargo damage and that the decision was made not by the vessel's master but by her owners. Based upon these contentions, the plaintiffs argue that the owners having supplanted the judgment

of the master for their own, cannot now claim limited liability for the damage that resulted. The facts as we find them do not support the plaintiff's contentions. We conclude rather that the circumstances of this case place it within the scope of the statutes discussed and lead inescapably to a judgment for the defendant shipowner.

I—The Inherent Vice of the Cargo and Plaintiff's Failure to Prove Condition at the Time of Delivery.

At the trial of this case, considerable expert testimony was presented with regard to the chemical properties of the cargo. Fishmeal is an organic compound containing a large percentage of highly unsaturated fats. Such substances have a propensity for oxydizing in an exothermic reaction the rate of which increases geometrically, resulting in overheating and eventual spontaneous combustion. The presence of moisture in the air surrounding the fishmeal increases the amount of available oxygen, intensifying the reaction rate and the concomitant overheating process. Thus improper preparation for shipment resulting in latent moisture or improper stowage resulting in poor ventilation may bring about spontaneous combustion in a cargo of fishmeal.

In the case of a cargo subject to damage as a result of latent defects, the burden is on the plaintiff shipper to demonstrate delivery to the carrier in good condition. *Commodity Service Corp.* v. *Hamburg-American Line*, 354 F. 2d 234 (2d Cir. 1965); *Hecht, Lewis & Kahn, Inc.* v. *The S.S. President Buchanan*, 236 F. 2d 627 (2d Cir. 1956); *The Neil Maersk*, 91 F. 2d 932 (2d Cir. 1937). Plaintiff, herein has failed to sustain this burden.

Plaintiff's exhibit 15, a Fishmeal Certificate of Inspection, which was offered as evidence of the condition of the Matarani fishmeal at the time of shipment is clearly insufficient in two respects. First, with regard to technical admissibility, the plaintiff has failed to provide the required foundation for the introduction of the certificate as a business record. Under both the current business records statute, 28 U.S.C. § 1732 and Rule 803(6) of the Rules of Evidence recently approved by the Supreme Court a custodian or other qualified witness familiar with the routine employed in the preparation of the records of the business must testify as a foundation for the introduction of the record in question. The fishmeal certificate was prepared by a firm of cargo surveyors in Peru. Plaintiffs offered the certificate in evidence based solely upon the testimony of one Vincent Walsh, and employee of the H. T. Baker & Brothers, Inc., one of the plaintiff cargo owners. Walsh testified that the certificate was received by Baker & Brothers in the regular course of that company's business. However, no testimony was introduced with respect to the procedures employed in preparing and issuing the certificate. *See United States* v. *Posenstein, et al.*, Crim. Nos. 72-1092, 72-1190 (2d Cir. January 26, 1973).

The second and more substantive insufficiency of the certificate concerns its contents. The certificate is conclusory in nature; it lists the temperature, moisture content and fat content of the Matarani fishmeal and describes the cargo as being "in proper condition for the voyage intended." No information is provided as to how these measurements were taken or as to whether an examination covered possible latent defects of the cargo not apparent

by external observation. In *The Neil Maersk*, the court rejected a similar certificate that had been offered to establish the condition of cargo at the time of shipment stating,

> [T]he certificates of the Exporters Association were surely not competent proof. They were in no way official documents entitled to be received in evidence, and without them there was nothing to show the condition of the fish meal when shipped. *Supra*, 91 F. 2d at 933.

This absence of any competent evidence of the condition of the fishmeal at the time of delivery is emphasized by our finding that the stowage aboard the Maranon was proper. Because of its propensity for spontaneous combustion, fishmeal is customarily stowed in accordance with the so-called "South African Strip" method. Pursuant to this method, bags of fishmeal are stacked with wooden planks between set numbers of bags and canals between the stacks to insure proper ventilation. The stowage aboard the Maranon was within the minimum requirements of the South African Strip method. The plaintiffs contend that, even if the initial stowage of the fishmeal was proper, there was a failure to maintain continuous ventilation. In this regard, the plaintiffs rely upon the absence of any log entries indicating precisely when the Maranon's mechanical ventilation system was started. However, the deposition of the Captain of the Maranon indicates that the ventilation system was put into operation as soon as the first bag of fishmeal was loaded and continued to function properly throughout the voyage. We find that both the stowage and ventilation procedures employed aboard the Maranon were proper in all respects.

II—The Shipowner Did Not Supplant Its Judgment For That Of The Master

In addition to their arguments with respect to improper stowage the plaintiffs contend that the management of the voyage after the initial overheating was discovered was improper and was made not by master but by shipowner. The evidence does not support this contention. The plaintiffs' contention is based on two decisions made during the voyage of the Maranon. First, the decision to proceed with the voyage in light of the fact that the Maranon experienced a rupture in the casing of one of her four cylinders before arriving at Cristobal. Despite the damage, the speed of the Maranon was only slightly impaired due to favorable currents and winds on the voyage from Cristobal. We, therefore, find no connection between the damage to cylinder casings and the cargo fire. The second event relied on by the plaintiffs was the decision of the master not to employ CO_2 fire extinguishers to control the fire aboard the Maranon. After consideration of the testimony as to the possible effects of the use of CO_2 in a fishmeal fire, we cannot conclude that the Master's decision was improper. Moreover, of greater importance than the propriety of the master's decisions to sail from Cristobal and not to use CO_2 extinguishers, is the fact that these decisions were made by the ship's master and not by her owner. The communications between the master and the owner do not reflect an attempt by the owner to infringe upon the master's discretion or to supplant his judgment with its own.

By reason of the findings set forth above, we conclude that the fire and resulting cargo damage are not ascriable to any actual fault or privity by the vessel owners and that the defendant is entitled to limited liability under 46 U.S.C. §§ 182, 1304(2)(b) and 1304(2)(m). Accordingly, the defendant is awarded judgment in the amount of $95,240.33 on its counterclaim for General Average contributions due,

to be apportioned as follows: $7,045.10 from plaintiff J. Howard Smith, Inc.; $6,921.04 from plaintiff H.J. Baker & Bro., Inc.; $28,263.63 from plaintiff Wilbur-Ellis Company; $7,417.39 from plaintiff International Porteins Corp.; $30,842.39 from plaintiff Cargill, Inc.; and, $14,750.77 from plaintiff Gloucester By-Products, Inc.

Judgment shall be entered in accordance with the aforesaid opinion.

. . . . . .

U.S.D.J.

Dated: New York, New York
March 21, 1973.

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 AD 496 LPG

#73,346

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs,

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendants.

This action having come on for trial before this Court, Honorable LEE P. GAGLIARDI, United States District Judge,

presiding, and the issues having been duly tried and the Court having thereafter rendered and filed an opinion, dated March 21, 1973, it is hereby

ORDERED, ADJUDGED AND DECREED, that the amended complaint of the plaintiffs herein be and the same is hereby dismissed on the merits and that defendant CORPORACION PERUANA DE VAPORES recover its costs from the plaintiffs herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the said defendant CORPORACION PERUANA DE VAPORES, recover from plaintiffs on the counterclaims which it asserted against them, the following sums, to wit: $7,045.10 from plaintiff, J. HOWARD SMITH, INC.; $6,921.04 from plaintiff H. J. BAKER & BRO., INC.; $28,263.63 from plaintiff WILBUR-ELLIS COMPANY; $7,417.39 from plaintiff INTERNATIONAL PROTEINS CORP.; $30,842.39 from plaintiff CARGILL, INC.; and $14,750.77 from plaintiff GLOUCESTER BY-PRODUCTS, INC., together with interest thereon from July 1, 1968
L P G ~~to February 16, 1969, at the rate of 7¼%, from February~~
L P G ~~16, 1969 to August 31, 1972, at the rate of 7½%, and from~~
L P G ~~August 31, 1972,~~ to date, at the rate of 6%.

Dated: New York, New York
April 11th, 1973

/s/ LEE P. GAGLIARDI
USDJ

Judgment entered Apr 12 1973

THOMAS E. ANDREWS
Acting Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 822—September Term, 1973.
(Argued April 22, 1974 Decided July 25, 1974.)
Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs-Appellants,

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendant-Appellee.

Before:

LUMBARD and HAYS, *Circuit Judges*, and
JAMESON, *District Judge.**

Appeal from orders entered in the United States District Court for the Southern District of New York, Lee F. Gagliardi, *Judge*, dismissing libel and complaint by cargo owners against carrier for damage to cargo and granting carrier judgment in counterclaim for contribution in general average.

Affirmed.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

Appendix B—Opinion of Court of Appeals dated July 25, 1974

DONALD M. KENNEDY, New York, New York (Donovan, Donovan, Maloof & Walsh, New York, New York, on the brief), *for Plaintiffs-Appellants.*

RICHARD T. O'CONNELL, New York, New York (Healy & Baillie, New York, New York, on the brief), *for Defendant-Appellee.*

HAYS, *Circuit Judge:*

A group of cargo owners brought this action to recover from the carrier losses incurred when their cargoes of fishmeal caught fire aboard the vessel. The carrier counterclaimed seeking contribution in general average. The district court found the carrier free from fault and therefore dismissed the complaint and granted the carrier judgment on the counterclaim.

We affirm.

In April and May, 1965, the S.S. Maranon picked up some 132,000 bags of anchovy fishmeal at Matarani, Callao, Huacho, and Chancay, Peru, and headed for Baltimore, Maryland. A few days after leaving Chancay the crew discovered overheating in some of the sacks of fishmeal that had been loaded at Matarani. The master of the ship ordered certain sacks placed on deck and others jettisoned in an attempt to isolate and alleviate the problem.

The master contacted the owner, and when the vessel reached Cristobal, Panama Canal Zone surveyors were brought aboard. After the surveyors examined the cargo and reported their findings it was decided that the ship would proceed.

Shortly after leaving Cristobal overheating recurred and fire broke out in the Matarani cargo. The master continued the voyage but then decided to dock in Savannah, Georgia, where the voyage was terminated and general average declared.

To impose liability on the shipowner for the loss suffered to the cargo, the cargo owner must show "design or neglect" or "actual fault or privity" by the carrier. Negligence of the master or the crew will not suffice. 46 U.S.C. § 182 (1970); Carriage of Goods by Sea Act § 4(2)(b), 46 U.S.C. § 1304(2)(b) (1970). Appellants' case does not meet this statutory standard.

If improperly prepared for shipment fishmeal may ignite through spontaneous combustion. The carrier is not liable for damage arising from such inherent defects. Carriage of Goods by Sea Act § 4(2)(m), 46 U.S.C. § 1304(2)(m) (1970). Where cargo has such a propensity for damage due to latent defects the shipper bears the burden of proving delivery to the carrier in good condition. *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind*, 371 F. 2d 537, 539 (2d Cir. 1967); *Commodity Service Corp.* v. *Hamburg-American Line*, 354 F. 2d 234 (2d Cir. 1965). In an attempt to discharge this burden appellants introduced a Fishmeal Certificate of Inspection for the Matarani cargo prepared by a firm of cargo surveyors in Peru. The district court properly found this inadequate in two respects.

First, appellants failed to establish a foundation adequate to bring the certificate within the scope of the "business records" exception to the hearsay rule. 28 U.S.C. § 1732 (1970). In *United States* v. *Rosenstein*, 474 F. 2d 705 (2d Cir. 1973), this court held that the foundation must

be laid by "someone who is sufficiently familiar with the business practice." Id. at 710. We declared that, while the foundation need not be established by one who personally makes or keeps the records, it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records.[1]

Appellants sought to establish the foundation through the testimony of an employee of one of the appellants who was not associated with the Peruvian firm. He had no personal knowledge of how the firm created or kept the records. Thus there was no testimony by "someone who is sufficiently familiar with the business practice" of the record-keeping company, and no adequate foundation was established.

The district court also properly rejected the certificates on the ground that they contained conclusions about the temperature, fat content, and moisture content of the cargo without indicating how such measurements were taken or whether the inspection extended to possible de-

1. See also *Phillips* v. *United States*, 356 F. 2d 297, 307 (9th Cir. 1965), cert. denied, 384 U.S. 952 (1966), where the court found documents inadmissible because "[t]hey were not made in the regular course of the business of the company in whose files they were found. . . ."

Nichimen Co. v. *MV Farland*, 333 F. Supp. 691 (S.D.N.Y. 1971), modified on other grounds 462 F. 2d 319 (2d Cir. 1972), does not apply here. The court there held that a clean bill of lading established a prima facie case of delivery in good condition. 333 F. Supp. at 696. The conclusion was mandated by the Carriage of Goods by Sea Act § 3(4), 46 U.S.C. § 1303(4) (1970). That statute does not apply here because the certificate introduced by appellants was not a bill of lading and because section 3(3)(c) of the Act, 46 U.S.C. § 1303(3)(c) 1970, specifically excludes defects which the carrier "has had no reasonable means of checking."

fects not apparent from an internal examination. Had they been admitted there would have been no way for appellees to determine by cross-examination how reliable the records were. Cf. *Aunt Mid, Inc.* v. *Fjell-Orange Lines*, 458 F. 2d 712, 719 (7th Cir.), cert. denied, 409 U.S. 877 (1972). The certificates were not admissible. See *The Neil Maersk*, 91 F. 2d 932, 933 (2d Cir.), cert. denied, 302 U.S. 753 (1937).

As to the non-Matarani cargo there was not even an attempt to prove delivery in good condition. Thus appellants did not sustain their burden as to any part of the cargo.

Appellants claim that appellee failed to maintain proper ventilation of the cargo during the voyage. They relied on the absence of entries in the ship's log indicating when the ship's mechanical ventilation system was started. However, the master of the ship testified that he started the system when the fishmeal was first loaded and continued it throughout the voyage. The conflict in the evidence was for the district court to resolve. Appellants also claim that stowage of the fishmeal was improper. There was ample evidence that the stowage, though not perfect, reasonably complied with the "South African Strip" method. The conclusion that stowage and ventilation aboard the Maranon were proper was not clearly erroneous.

Appellants claim that, even if improper ventilation did not start the fires in the ship, the owners of the ship assumed control from the master when the ship reached the Canal Zone, thereby waiving their protection under 46 U.S.C. §§ 182 and 1304(2)(b), and that they were therefore liable for the results of their negligent decision to

have the Maranon proceed.[2] See *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333, 344 (1933).

The conclusion of the district court that the master retained control of the ship is not clearly erroneous. The communications between the master and the owner are subject to different interpretations. The master testified that he never relinquished control of the ship. It was the proper province of the district court to resolve any conflicts in the evidence.

Appellants claim that the master was negligent in not using carbon dioxide to extinguish the fires when they first appeared. The negligence of the master, as we have observed, does not give rise to liability of the carrier. Nor does it defeat the claim of the carrier for contribution in general average where the bills of lading include a "Jason" clause, which invokes the right to general average for damage caused by the negligence of the crew or the master. *The Jason*, 225 U.S. 32 (1912). However, the bills of lading in this case did not contain a Jason clause, and the case is therefore controlled by the traditional rule that the ship at fault has no right to general average contribution. *The Irrawaddy*, 171 U.S. 187 (1898); G. Gilmore & C. Black, *The Law of Admiralty* § 5-13 (1957).

However, the district court found that the master was not negligent in declining to use CO_2. There was testimony that the gas might condens and cause further damage, and that the gas might condense and cause further damage, and damage to the cargo. We cannot hold the finding of the trial judge clearly erroneous.

Affirmed.

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2. Appellants have apparently abandoned the claim based on the decision to have the Maranon proceed despite a rupture in one of its four cylinder casings before it arrived at Cristobal.

APPENDIX C

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs-Appellants,

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendant-Appellee.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Petitioner-appellants respectfully request the Panel for a rehearing and respectfully suggest of this Court a rehearing in Banc on the following grounds:

1. The Panel by its decision has effected a new construction of the United States Carriage of Goods By Sea Act insofar as it applies to the *prima facie* effect to be given to an ocean bill of lading.

2. The Panel by its decision has altered the application of the "clearly erroneous" doctrine insofar as it applies to a case where the evidence is substantially in the form of depositions and documents.

3. The Panel by its decision extended the application of the "clearly erroneous" doctrine to conclusions of law, more particulary, a determination of negligence.

4. The Panel in its decision overlooked and misconceived petitioners' arguments on appeal all having to do with fault of the defendant which gave rise to or continued the fire on the vessel.

This action arose from fires in cargoes of fishmeal, the propensites of which are known to all parties. While the shipper is obligated to deliver the cargo to the ship in good order and condition with a certificate verifying such condition, the carrier is thereafter bound during its transportation by sea, to give it that care which the particular cargo requires for its safe transportation and the safe transportation of all other cargo then on board.

The trial court found that fire originated in the Matarani cargo and this finding was upheld by the Panel. The only evidence as to the cause of fires in other cargoes was that they were precipitated by the Matarani cargo fires. The Panel erroneously concluded that there could be no recovery for the other cargo because no attempt was made to show good order and condition of these other cargoes. In a footnote at page 4974 of the opinion it was said that the United States Carriage of Goods By Sea Act (1936) 1303 (4) was not applicable because bills of lading for these cargoes were not introduced by appelants. Such documents were not reproduced in the Appendix but they were received in evidence upon the trial as plaintiff's exhibits 1 and 2 (App. 56a, 57a). On the basis of the holding in *The Katingo Hadjipatera* (S.D.N.Y. 1948) 81 F. Supp.438, modified on other grounds and affirmed (2 Cir. 1952) 194

F. 2d 449 the bills of lading proved the actual good order and condition of all but the Matarani cargo upon shipment. The Panel also in the same footnote held that the provision for the "prima facie" effect to be given a bill of lading did not apply to ". . . defects which the carrier 'has had no reasonable means of checking' " (referring in part to 1303(3)(c)).

This holding is faulty in that it erroneously premised upon a misreading of the act. The sentence from which it was taken reads in its entirety:

> "Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any *marks, number, quantity or weight* which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he *has had on reasonable means of checking.*" [emphasis added]

The above provision, then, was quoted out of context for it permits the carrier to *decline to show in the bill of lading marks, number, quantity or weight which he has no reasonable means of checking.* If the construction sought to be given to the section by this Panel is to stand, then the carrier could readily avoid the *prima facie* effect required of any bill of lading because a carrier rarely if ever has an opportunity to inspect or check the contents of packages given to it for transportation. Indeed, if one were to encourage such internal inspection the opportunity for theft, damage and the like in ocean transportation would undoubtedly result in an unwarranted proliferation of litigation.

The Panel in reviewing certain findings of the trial court held that they were not clearly erroneous. The record

shows, however, that the evidence at trial was substantially in the form of depositions and documents. This Court has held that under such circumstances the "clearly erroneous" rule is not determinative of the correctness of the trial court's findings of fact. *J. Gerber & Co.* v. *S.S. Sabine Howalt, et. al.*, (2 Cir. 1971) 437 F. 2d 580. Furthermore, certain critical testimony relied upon by both the trial court and this Court came from the vessel's master who had on four occasions reported the existence of a fire and who subsequently reported the outbreak of *another* fire and who yet contradicted himself under oath, albeit via deposition, and denied the existence of such earlier fire. *That such earlier fire had in fact occurred was never disputed for the parties stipulated to its existence in the pre-trial order (App. 25a). It was also reported in the vessel's log* (Ex. Vol.374).

The master said he ventilated as he was required to do. Both tribunals accepted his testimony in spite of the fact that his log did not support him.

The defendant claimed that the master remained in control of the vessel at all times. In support of this contention it rested solely on the self serving testimony of the master. This testimony was refuted by messages exchanged contemporaneously with the events. Particular reference is made to plaintiff's exhibits G-1 and L-1, L (Ex. Vol. 472a, 473a, 483a) which establish beyond question that the owner exercised control both upon the interruption of the voyage at Panama and its resumption. It is respectfully submitted that a consideration of the entire record does not support the findings of fact made by the trial court and upon which the Panel based its affirmance.

The Panel held that the determination of the trial court that the master was not negligent in failing to use CO_2 to

extinguish the fire was not clearly erroneous. However, a determination of negligence is a conclusion of law rather than a finding of fact and is not governed by the "clearly erroneous" doctrine. *J. Gerber & Co.* v. *S.S. Sabine Howalt et al., supra.* In any event, the holding that the master was not negligent on this ground for the reason that its use would have caused further damage is untenable. On the questionable ground that condensation might have occurred in the burning cargo, the master did not use the means at hand to put the fire out. His duty to protect the cargo had been breached. *American Mail Line Ltd.* v. *Tokyo Marine and Fire Ins. Co. Ltd.* (9 Cir. 1959) 270 F. 2d 499, 501 cited with approval in, *Asbestos Corp. Ltd., et al.,* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.,* (2 Cir. 1973) 480 F. 2d 669, 672.

The vessel was equipped with a CO_2 fire extinguishing system, a standard type of fire-fighting equipment for such cargo and indeed in some instances mandated for the carriage of fishmeal by regulation. 46 C.F.R. Sec. 146.27-100 which in turn refers to 46 C.F.R. Sec. 146.27-27(b)(2) provides that if fishmeal is carried in bulk it must be carried in a vessel having "an approved carbon dioxide fire extinguisher system". It should be noted also that a year earlier under similar circumstances the same defendant had successfully used CO_2 to combat a fishmeal fire in one of its vessel (Pl. Ex. 14 Putumayo General Average, Ex. Vol. 434-442).

It is evident that the trial court and the Panel misunderstood and overlooked appellants' arguments relating to defendant's fault as giving rise to or continuing the fires in the cargoes, particularly upon and after the vessel's departing Panama. The Panel at page 4976 correctly con-

cluded that the bills of lading in this case did not contain a Jason Clause, and that thereby if the ship was at fault the owner had no right to contribution in general average. It was not established at trial that the fires occurred because of an inherent vice of the Matarani cargo in which fires originated.

In addition to the contention that the master was negligent in not using CO_2, appellants also contended that under the known circumstances the voyage should not have been continued with a damaged engine, which impaired the vessel's speed by between 15 to 20%, an essential consideration in the carriage of fishmeal. This contention was not abandoned as suggested in the footnote at page 4975 of the decision. On the contrary at page 24 of its principal brief on this appeal appellants, in reference to the dereliction of the owner said: "it knew that the vessel had sustained engine damage which could not but substantially reduce her speed and that dispatch was an element in the carriage of fishmeal particularly fishmeal which has a tendency to overheat." On the same page in reference to the dereliction of the master appellants said: "he also knew that his vessel's speed would be reduced from 2 to 2½ knots or by between 15 to 20%." This knowledge of the owner and the master is indicative of a total lack of concern for the care of the cargo. The reduction in speed also directly contributed to the loss for according to the evidence additional fires broke out shortly after the vessel arrived at Savannah, the port of refuge. Had the vessel arrived a day or two earlier it would, but for the deficiency in speed, have been able to safely discharge the sound cargo.

An additional argument of appellant one which was not passed upon by the trial court and which was not considered

by the Panel, and which remains undecided, concerns the question of whether the owner and/or the master were negligent in not returning the vessel to Panama when within hours after sailing from that port, further overheatings and fires were found in the cargoes.

WHEREFORE, petitioners-appellants respectfully pray that the Court grant the relief sought herein and permit reargument and suggested in banc review.

Respectfully submitted,

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Petitioners-Appellants

DONALD M. KENNEDY
FRANCIS J. MCCAFFREY
Of Counsel

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 822 September Term 1973
(Argued April 22, 1974 Decided September 3, 1974

Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs-Appellants,

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendant-Appellee

Before: Lumbard and Hayes, Circuit Judges, and Jameson, District Judge.*

Petition for rehearing on a decision of this Court rendered on July 25, 1974, affirming orders entered in the United States District Court for the Southern District of New York, Lee F. Gagliardi, *Judge*, dismissing libel and complaint by cargo owners against carrier for damage to cargo and granting carrier judgment in counterclaim for contribution in general average.

Petition granted in part and opinion modified.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

Appendix D—Order of Court of Appeals dated September 3, 1974 granting rehearing in part modifying its opinion and further subsequent modification

PER CURIAM:

By an opinion dated July 25, 1974, this Court affirmed a judgment entered in the United States District Court for the Southern District of New York. Appellant has now petitioned for a rehearing on our order.

We grant the petition for rehearing and modify our opinion by deleting the second paragraph of footnote 1. In all other respects we adhere to our original decision.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

Smith v. S.S. Maranon

Docket No. 73-1921 Decided July 25, 1974

In Judge Hays' opinion in the above-entitled case the following changes have been made:

Page 4971, line 22—delete "Lee F." and insert "Lee P." in place thereof.

Page 4976, line 16—delete "gas might condense and cause further damage, and" and insert "conduct of the crew and captain actually minimized" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hd

APPENDIX E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of York, on the twenty-fourth day of December, one thousand nine hundred and seventy-four.

73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

Plaintiffs-Appellants,

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ WILFRED FEINBERG
Acting Chief Judge
Wilfred Feinberg

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-418

J. HOWARD SMITH, INC., ET AL.,

Petitioners

—against—

S. S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 1, 1975.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 20th day of November, 1974

Appendix F—Two orders of the Supreme Court dated November 20 and December 23, 1974 granting extension of time to petition for writ of certiorari

SUPREME COURT OF THE UNITED STATES

No. A-418

J. HOWARD SMITH, INC., ET AL.,

Petitioners

—against—

S. S. MARANON, ETC., ET AL.

Order Further Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including January 31, 1975.

/s THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of December, 1974

APPENDIX G

28 U.S.C. § 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1333. ADMIRALTY, MARITIME AND PRIZE CASES

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

46 U.S.C. § 182. LOSS BY FIRE.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282.

46 U.S.C. § 1303. RESPONSIBILITIES AND LIABILITIES OF CARRIER AND SHIP—SEAWORTHINESS

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

CONTENTS OF BILL

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any

marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

BILL AS PRIMA FACIE EVIDENCE

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81-124 of Title 49.

GUARANTY OF STATEMENTS

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

NOTICE OF LOSS OR DAMAGE; LIMITATION OF ACTIONS

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill

of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"SHIPPED" BILL OF LADING

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the

"shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

LIMITATION OF LIABILITY FOR NEGLIGENCE

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

46 U.S.C. § 1304. RIGHTS AND IMMUNITIES OF CARRIER AND SHIP—UNSEAWORTHINESS

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted

from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

FREEDOM FROM NEGLIGENCE

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

DEVIATIONS

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of

loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

AMOUNT OF LIABILITY; VALUATION OF CARGO

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently mistated by the shipper in the bill of lading.

INFLAMMABLE, EXPLOSIVE, OR DANGEROUS CARGO

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be

landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessery on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).